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No. 97-135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OLD VAIL PARTNERS

Petitioner,

v.

COUNTY OF RIVERSIDE AND
CITY OF TEMECULA

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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I.
MOTION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF THE PETITIONER

The National Association of Home Builders ("NAHB") and the Building Industry Legal Defense ("BILD") Foundation have received written consent to file this brief as amici curiae from the petitioner and from one of the respondents, the City of Temecula, and have filed the letters of consent with the Clerk of the Court.[1/] The other respondent, Riverside County, has not consented.

1/ This brief was authored in whole by counsel for the amici curiae. No one other than the amici curiae made any monetary contribution to the preparation or submission of this brief.

A. Motion To File An Amici Curiae Brief In Support Of The Petitioner

The NAHB and the BILD Foundation move this Court for leave to file their amici curiae brief in support of the petitioner because to date no party has cited the recent and pertinent—if not controlling—decision by this Court in *Quackenbush v. Allstate Insurance Co.*, ___U.S. ___, 116 S.Ct. 1712 (1996). Further, the petition fails to demonstrate that the decision in the case at bar is in conflict with decisions of other courts of appeals and the Ninth Circuit itself which is unwilling to provide the same access to federal courts for landowners and developers that it extends to convicted felons.

B. The Interests Of The Amici Curiae Arise From Their Members' Concerns As To Their Ability To Obtain Judicial Review In Federal Courts Of Actions By Municipalities Which Involve The Use Of Land

The NAHB represents over 190,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the right of its members to use their land and, when their right to use land is unduly interfered with by local governmental actions, to seek judicial review of those actions in federal court.

The NAHB has been before the Court as an amicus curiae or as "of counsel" to the property owner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon,* 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California*

Coastal Commission, 483 U.S. 825 (1987)[2], and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California, a constituent part of the NAHB, whose 1,400 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

The amici curiae submit this brief in support of the petitioner to assist the Court in determining whether to grant its writ of certiorari to decide if a federal district court is required to dismiss—as opposed to staying—an action involving the use of land merely because the federal court plaintiff is also the plaintiff in a similar state court proceeding.

II.

SUMMARY OF THE ARGUMENT

The position taken by the Court of Appeals for the Ninth Circuit—that federal courts have the right to dismiss an action otherwise properly before the court under *Younger v. Harris*, 401 U.S. 37 (1971), whenever a plaintiff files a similar action seeking only damages arising out of the regulation of land in both state and federal courts—is wrong and requires this Court's writ of certiorari to correct it because it conflicts with the holdings by this Court and other courts of appeal that (1) *Younger* abstention, which requires dismissal rather than a stay of the federal proceeding, does not apply where the federal court plaintiff seeks only damages and (2) *Younger* abstention does not apply where the federal court plaintiff is not a defendant in the state court proceeding.

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[2] The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

III.

THIS COURT AND OTHER COURTS OF APPEALS HAVE HELD THAT *YOUNGER* ABSTENTION DOES NOT APPLY WHERE THE FEDERAL COURT PLAINTIFF SEEKS ONLY DAMAGES

A. The Ninth Circuit's Holding Is Contrary To This Court's Holding In *Quackenbush*

The Ninth Circuit in the case at bar applied *Younger* abstention without even considering the fact that Old Vail Partners was seeking damages for inverse condemnation and for violation of its rights under the 42 U.S.C. §§ 1983 and 1985 as a result of the actions taken by the City and the County. In doing so, the Ninth Circuit acted in complete contravention of this Court's recent holding in *Quackenbush:*

> "Under our precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or discretionary." *Quackenbush, supra,* 116 S.Ct. at 1728.

This Court's opinion in *Quackenbush* noted that it had dealt with the important question of the relationship between federal and state courts in the important area of condemnation, pointing out that it had *affirmed* a district court's stay of eminent domain proceedings in *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959), while *reversing* the *dismissal* of a similar case in *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185 (1959). (116 S.Ct. at 1723.)

Quackenbush did not deal with *Younger* abstention; instead, it held that dismissal was improper under the abstention doctrine set forth in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). (*Quackenbush, supra*, 116 S.Ct. at 1717.) However, the opinion in *Quackenbush* cited and relied on *Younger* and its progeny in reaching its holding that federal courts had no

authority to dismiss an action which did not seek discretionary relief. (116 S.Ct. at 1721-1722.)

> "Nevertheless, we have not previously addressed whether the principles underlying our abstention cases would support the remand or dismissal of a common-law action for damages. Cf. *Deakins v. Monaghan*, 484 U.S. 193, 302, and n. 6, 108 S.Ct. 523, 529, and n. 6, 98 L.Ed.2d 529 (1988)(reserving the question whether *Younger* requires abstention in an action for damages); ..." *Quackenbush*, *supra*, 116 S.Ct. at 1722.

This Court should grant its writ of certiorari to explain that *Quackenbush* means that dismissal is unavailable where a federal court plaintiff is seeking damages under either *Younger* or *Burford*.

B. Federal Courts Are Split On The Reach Of *Quackenbush*.

Some courts have read *Quackenbush* to mean that dismissal is not permissible under *Younger* where only nondiscretionary damages—as opposed to discretionary equitable or declaratory relief—are sought. See, *e.g.*, *Warmus v. Melahn*, 110 F.3d 566 (8th Cir. 1997), where the court held that a damage action was not subject to dismissal under *Younger* after *Quackenbush*.

In *Pompey v. Broward County*, 95 F.3d 1543 (11th Cir. 1996), the court, citing *Quackenbush*, noted in dictum "[i]t is doubtful that federal district courts may dismiss claims for damages under abstention principles." (95 F.3d at 1552 n.12.)

On the other hand, some courts have held that dismissal under *Younger* is proper

> "... where the damages sought cannot be awarded without first declaring unconstitutional a state court judgment on a matter firmly committed to the states." *Amerson v. State of Iowa*, 94 F.3d 510, 513 (8th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 696 (1996)(domestic relations).

See also *Moran v. Connecticut Department of Public Health*, 954 F.Supp. 484 (D. Conn 1997), where the court, relying on *Amerson*, dismissed a damage action under *Younger* because the award of damages would require an analysis of the constitutional validity of administrative proceedings stripping the plaintiff of his license to practice medicine. (954 F.Supp. at 488.)

This Court should grant its writ of certiorari to instruct the lower federal courts on *Quackenbush's* reach.

C. Other Courts Of Appeals Have Uniformly Held That The Proper Procedure Where Only Damages Are Sought Is To Stay—Rather Than To Dismiss—Federal Actions Where *Younger* Might Otherwise Apply

The Ninth Circuit's position is contrary to the positions of other courts of appeals. Pre-*Quackenbush* cases had uniformly held that a stay, rather than dismissal, was the proper response where *Younger* might otherwise apply but only damages were being sought. See, e.g., *Kyricopoulos v. Town of Orleans*, 967 F.2d 14, 16 n.1 (1st Cir. 1992); *Giulini v. Blessing*, 654 F.2d 189, 193-194 (2d Cir. 1981); *Williams v. Hepting*, 844 F.2d 138, 144 (3d Cir. 1988); *Lewis v. Beddingfield*, 20 F.3d 123, 125 (5th Cir. 1994); *Carras v. Williams*, 807 F.2d 1286, 1291-1292 (6th Cir. 1986); and *Doby v. Strength*, 758 F.2d 1405, 1406 (11th Cir. 1985).

This Court should grant its writ of certiorari to instruct the lower federal courts that *Quackenbush* means that a federal action should be stayed—but not dismissed—where the plaintiff is not seeking discretionary equitable or declaratory relief even if *Younger* might otherwise apply.

IV.
THIS COURT AND OTHER COURTS OF APPEALS HAVE HELD THAT *YOUNGER* ABSTENTION IS NOT APPLICABLE WHEN THE FEDERAL COURT PLAINTIFF IS ALSO THE STATE COURT PLAINTIFF

Every single one of the cases involving abstention under *Younger* decided by this Court has been marked by the same fact pattern: the federal *plaintiff* was seeking to enjoin state proceedings in which he or she was a *defendant.*

Initially, under *Younger* and the cases immediately following it, abstention was required in cases where a state court defendant in a criminal prosecution sought, as a federal court *plaintiff*, to have the state court prosecution enjoined. *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971); and *Kugler v. Helfant*, 421 U.S. 117 (1975).

This Court then extended *Younger* to those situations where the federal court plaintiff was a defendant in a state court civil proceeding and was seeking to enjoin that proceeding. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Trainor v. Hernandez*, 431 U.S. 434 (1977); and *Moore v. Sims*, 442 U.S. 415 (1979).

This Court next extended *Younger* to those situations where the federal court plaintiff was a state court defendant seeking to enjoin the use of state court enforcement methods being brought against him. *Juidice v. Vail*, 430 U.S. 327 (1977); and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

Finally, this Court extended *Younger* to those situations where the federal court plaintiff was the defendant in state administrative proceedings and was seeking to enjoin the continuation of those proceedings. *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1982); and *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986).

Other courts of appeals have recognized that *Younger* abstention does not apply where the federal court plaintiff is also the state court plaintiff. See, *e.g., Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 791 F.2d 1111, 1117 (3d Cir. 1986), and *Crawley v. Hamilton County Commissioners*, 744 F.2d 28, 30 (6th Cir. 1984). Indeed, the Ninth Circuit distinguished *Crawley* in *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1360 n.8 (9th Cir. 1986), when it stated:

> "Although *Younger* abstention ordinarily would not apply when a federal plaintiff also is the plaintiff in state court, *see Crawley v. Hamilton County Commissioners*, 744 F.2d 28, 30 (6th Cir. 1984), it applies here, because the judicial proceeding filed by [the federal court plaintiff] was not truly voluntary; [the federal court plaintiff] petitioned for review only because the Board initiated agency proceedings and entered an order against the company."

This Court should grant its writ of certiorari to explain that *Younger* can apply only when the federal court plaintiff is a defendant in a state proceeding.

V.

THE NINTH CIRCUIT LIMITS *YOUNGER* ABSTENTION TO CASES INVOLVING THE REGULATION OF LAND

The Ninth Circuit has, for whatever reason, set up a dichotomy in the treatment of cases involving rights of owners and developers of real property and other rights. It uses a number of mechanisms to keep cases involving real property out of the federal courts in the Ninth Circuit. For example, it is impossible to allege that governmental action regulating land use violates the promise of substantive due process guaranteed by the Fourteenth Amendment; instead, such an action must be brought as a takings case which must then be tried in state

court. *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997); *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1986); and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). Even where a facial attack is brought contending that a taking has occurred and the federal courts have jurisdiction, the Ninth Circuit demands that the district courts abstain under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). *Sinclair Oil Corp., supra*. On the other hand, the Ninth Circuit will go further in other contexts and find constitutionally protected rights where none exist. See, *e.g., Compassion In Dying v. State of Washington*, 49 F.3d 586 (9th Cir. 1995), *rev'd sub nom State of Washington v. Glucksberg*, ___ U.S. ___, 117 S.Ct. 2258 (1997) (constitutionally protected right to doctor assisted suicide).

All of this is directly contrary to the position taken by this Court in its decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which reaffirmed the importance of the Fifth Amendment:

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation ...." *Dolan, supra*, 512 U.S. at 392.

The Ninth Circuit has no problem in holding that a federal court plaintiff who is also a state court plaintiff who is suing for damages because of a misuse of the state criminal system is not going to have his federal court action for damages dismissed under *Younger*. See *Martinez v. Newport Beach City*, ___ F.3d ___, 97 Daily Journal D.A.R. 11739 (9th Cir., Docket No. 95-56866, September 10, 1997), where the Ninth Circuit reviewed its past cases involving similar situations and concluded that dismissal under *Younger* was contrary to Ninth Circuit precedent. However, it failed to cite its contrary decision in a case involving facts very similar to the case at bar,

Mission Oaks Mobile Home Park v. City of Hollister, 989 F.2d 359 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994).

How can the Ninth Circuit allow a convicted felon who is seeking damages the right to judicial review in federal courts but deny the same right to a landowner or developer? The answer is that it can't and that it shouldn't be allowed to.

VI.

CONCLUSION

Quackenbush should have settled the question of whether dismissal is proper in the land use context where *Younger* abstention would otherwise be available but the federal court plaintiff is not seeking discretionary relief. As demonstrated by the Ninth Circuit's decision in the case at bar, it did not. Unfortunately, to some courts, "the applicability of *Younger* abstention to ... monetary claims is unclear." *Hirsch v. Justices of the Supreme Court of the State of California,* 67 F.3d 708, 715 n.5 (9th Cir. 1995).

The stakes involved—the general applicability of *Younger* and the particular treatment of the rights of landowners and developers—are too high to be left to the whim of individual courts. Landowners and developers have the right to have their claims that municipalities have violated their federally-constitutionally-protected property rights heard in federal courts. As pointed out in the petition for certiorari, that can happen only where actions for just compensation are first brought in state courts. Landowners and developers should not be deprived of the right to have their claims heard in federal courts because of a rule adopted by this Court in another context and now misapplied by the Ninth Circuit.

The guidance needed by the Ninth Circuit and other lower federal courts in order to deal fairly with landowners and developers can only can be provided if this Court issues its writ of certiorari to the Court of Appeals for the Ninth Circuit.

The NAHB and the BILD Foundation ask that it do so.

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Respectfully submitted,

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